Supreme Court, U. S.
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No. 98-1004

In the

# Supreme Court of the United States

October Term, 1998

**OLGA H. GARAU,**

Petitioner,

v.

**JAMES K. HAHN, THOMAS C. HOKINSON and CITY OF LOS ANGELES,**

Respondents.

On Petition for A Writ of Certiorari
to the Supreme Court of California

## PETITIONER'S REPLY BRIEF

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No. 98-1004

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**OLGA H. GARAU,**

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**JAMES K. HAHN, THOMAS C. HOKINSON**
**CITY OF LOS ANGELES**

Respondents.

## PETITIONER'S REPLY BRIEF

## RESPONDENTS HAVE LIED TO THIS COURT ABOUT PETITIONER'S REPRESENTATIONS AS TO THE PROCEDURAL POSTURE

Contrary to Respondents' contention at RB:5, Petitioner ***did*** inform this Court (as well as the California Court of Appeal and the California Supreme Court) that, under pressure from the trial judge, she dismissed three causes of action (See Pet:23), ***and*** that the remainder of her case continued against the City of Los Angeles only to be dismissed on summary judgment (see Pet:23), by a biased judge who failed to follow even the minimum statutory procedures required of him when his impartiality was challenged, let alone the Canons of Judicial Ethics.

And Petitioner did not represent that all sixteen causes of action against the City survived demurrer because in fact they did not: the trial judge dismissed three causes of action on demurrer,[1] leaving only 13, of which two were dismissed on motion for judgment on the pleadings due to the failure of Petitioner's attorney to file written opposition,[2] and the remaining 12 were disposed of summarily without trial.[3]

## RESPONDENTS HAVE ALSO MISSTATED AND OMITTED THE FOLLOWING KEY FACTS

1. Petitioner's motion to the Ninth Circuit Court of Appeals in October of 1996 was not the genesis of her constitutional and civil rights claims against Respondents, but their pretext. A long history of facts dating back to 1990 is detailed in the First Amended Complaint at A: 32-44. Petitioner's verbal complaints to her supervisors about it as early as March of 1996 and her October 15, 1996 formal

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[1] Count 14 for intentional and negligent infliction of emotional distress and count 10 for negligence per se on grounds of workers' compensation exclusivity contrary to clearly established state precedent, and count 15 for state due process violation on grounds of waiver which is a question of fact for the jury that could not be decided on demurrer.

[2] Count 11 for state equal protection violations and count 13 for abuse of official authority in violation of public policy, which was accordingly not a decision on the merits.

[3] Partial summary adjudication was granted as to Count 4 for violation of the Ralph Act, premised upon the physical destruction of a picture frame in Petitioner's office. And a second motion for summary judgment disposed of the remaining seven remaining causes of action for violations of FEHA [(*Government Code §12940*)], the Bane Act (*Civil Code §52.1*, whistleblower statute at *Labor Code §1102.5,* free speech at Art. I, §2 of the California Constitution, right to petition the government at Art. I, §3 of the state constitution, anti-discrimination clause of the State's Constitution (Art. I. §8), and the common-law tort of constructive wrongful termination in violation of fundamental public policy embodied in all of the constitutional and statutory sections alleged.

written complaint of discrimination, retaliation, and harassment, to Respondent Hahn, all went unheeded and unredressed. Her 9th Circuit motion, complaining to the Ninth Circuit in essence about discrimination by a male Caucasian co-counsel to protect her client's litigation position, is what triggered full-blown retaliation against her: the employment termination threatened by Respondents in the "Skelly" notices referred to in their brief, which became even more pointed after she filed her formal government claim and administrative charge with the California Department of Fair Employment and Housing. See Pet.:7.

2. Petitioner refused to withdraw the motion in the 9th Circuit because it negatively affected her client's interests. See Petitioner's explanatory memorandum to her supervisor attached for the Court's benefit at A:85-87. The motion is also attached to this Reply Brief at A:74-84 so that this Court can determine for itself what actually happened.

3. The gravamen of Petitioner's complaint against Respondents is therefore retaliation, which they have downplayed and notably omitted throughout this case, even at RB:3, since the nexus between her October 15, 1996 formal written complaint of discrimination to the City Attorney and the disciplinary proceedings initiated barely three weeks later in connection with the 9th Circuit motion is so obvious.

4. A "Skelly" notice is a constitutionally-required procedure for Petitioner's benefit. But while "entitled" to it, she is not legally required to respond to it, no matter how many opportunities to respond are afforded, contrary to Respondents' insinuation at RB:3-4.

5. Petitioner did not misrepresent any facts regarding her constructive wrongful termination. She was forced to leave her position by a long series of events detailed in her First Amended Complaint at A:33-44, wrongfully created and maintained by Respondents in violation of fundamental public policy, and of her duties as an attorney, which Respondents share and precluded her from performing.

6. Finally, Respondents omit to tell this Court that it is irrelevant as to Respondent Hokinson in these proceedings that four counts were dismissed on dual employment grounds because Hokinson was not a named defendant as to those counts. (See 2nd, 5th, 6th, and 16th causes of action in the First Amended Complaint at A:51, A:53, A:54, and A:65).

## NEW FACTS OCCURRING AFTER RESPONDENTS' BRIEF IN OPPOSITION

On January 21, 1999, the California Court of Appeal dismissed both of Petitioner's pending state appeals without giving her the required prior notice of when the briefs were actually due as the Court did in the first appeal currently before this Court. So Petitioner is now virtually without a remedy and liable to pay 111,845.19 in attorneys' fees and costs that she does not have if certiorari is not granted.[4]

## WHY CERTIORARI SHOULD BE GRANTED

1. Petitioner did raise the equal protection issue in the trial court. She should not be penalized because her attorney, who incidentally was Patricia J. Barry—who successfully argued a landmark sexual harassment case before this Court,

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[4] While Petitioner is concurrently filing a motion to vacate the dismissal of those appeals on procedural due process grounds, we can only surmise what the state appellate court's ruling will likely be.

and who ceased representing Petitioner just prior to the summary judgment motions below—did not specifically mention the particular constitutional section, although she did raise the issue. (See RA:1-2). The law respects form less than substance. *See California Civil Code § 3528.*

2. And it is simply not true, as Respondents contend, that Petitioner has not made the affirmative showing required to refute the presumption that the state courts did not decide the question because the issue was not properly raised. The equal protection argument was squarely presented to each and every court below. See Pet:10-14. They simply chose to avoid deciding it because of their own conflict of interests as supervisors in the California public sector, which is why at a minimum Petitioner implores this Court to grant her leave to amend a 42 U.S.C. 1983 cause of action so she can go to an impartial federal forum where justice will be done.

3. It is not necessary for the state courts to have addressed the federal question. Where properly raised, their failure to address it, is itself reviewable by this Court. See Pet.:22.

4. Moreover, conflict in the law is not the only grounds for granting certiorari as insinuated by Respondents. Importance of the question presented, particularly to the public interest and to the integrity of our profession, as here, is an even more compelling ground for granting review. The equal protection rights of tenured public employees in civil rights litigation is a question of national significance. So are the ethical obligations of public lawyers which lie so much at the heart of this case in more ways than one. These issues were important enough to compel Respondents to file a Brief in Opposition, and to have misrepresented in it a number of key facts and points of law in order to mislead (as if they could . . .!) this venerable Court into denying review.

## SUMMARY OF ARGUMENT

Respondents' Brief in Opposition, at page 8, misses the point completely: Petitioner is not arguing that government cannot have immunity. But rather that, as recognized by federal law, when it comes to constitutional and civil rights claims, the immunity of public officials, as opposed to that of the entity, is not absolute but qualified by good faith. And that because California law fails to acknowledge this, it violates the Federal Equal Protection Clause.

## RESPONDENTS ALSO MISREPRESENT THE LAW AND ATTEMPT TO MISLEAD THE COURT AS TO ITS TRUE IMPORT

### A. The Narrow Question Presented Has Never Been Decided By this or any Other Court

All of the cases cited by Respondents' upholding the constitutionality of California's Tort Claims Act involve only common-law wrongful death claims against the State, and ***not*** the constitutional and civil rights claims raised by Petitioner, a *tenured* public employee. *Roberts v. California* (1974) 39 Cal.App. 3d 844, 114 Cal.Rptr. 518 *and Stanley v. City and County of San Francisco* (1975) 48 Cal.App.3d 575 (1975) 48 Cal.App. 3d 575, 121 Cal.Rptr. 842 did not even involve discretionary immunity but the 6-month claim-filing requirement. And *Datil v. City of Los Angeles* (1968) 263 Cal. App. 2d 655, 69 Cal.Rptr. 788, and *Roberts, supra*, did not even involve equal protection but due process.

*Martinez v. California* (1980) 444 U.S. 277, is inapposite to the facts of this case because, unlike the sex offender there, Hahn and Hokinson are agents of a subdivision of the State which could forseeably harm Petitioner with whom

they had an employment relationship. Most importantly, a different immunity was involved in that case, under *Government Code §845.8* for injuries resulting from the release of a parolee, which notably does not say "whether or not discretion be abused." And as fn. 4 makes clear, only the due process, not the equal protection question was decided by this Court.

To be noted, on the other hand, is this Court's *dictum* in that case, insinuating that a federal interest might override a state immunity to protect the individual citizen from wholly arbitrary or irrational state action. Such is the case before you, since to argue that an immunity contained in a state statute can be contrary to the tenets of the State and the Federal Constitutions is absurd and violates every principle of statutory construction. It also contradicts the fundamental guarantee in *Government Code §§ 12920-12921* that employment without discrimination is a civil right to be afforded to *all* persons, that discriminatory employment practices deprive the *State* of the fullest utilization of its capacities and affect the interest of employees, employers, and the public in general, and that it is the purpose of *FEHA* to provide effective remedies which will eliminate such discriminatory practices. An interpretation which gives effect is preferred to one which makes void. *See Government Code §3541.*

### B. The Strict Scrutiny, Not the Rational Basis, Test Applies

The wrongful death victims in the cases cited by Respondents did not have a constitutionally protected **right to a tort cause of action** against public officials. Accordingly, under the rational basis test the State was free to condition its waiver of sovereign immunity by precluding

liability for discretionary acts. Contrast that with Petitioner, who had a **constitutionally protected right to the job** that she lost, triggering a heightened level of review: the strict scrutiny test, under which **discretionary** immunity fails, particularly where other subsequently enacted statutes,[5] and particularly the Constitution, impose a **mandatory** duty not to do that which the immunity allows. *Cf. Bonds v. State of California (CHP)* (1982) 138 Cal.App.3d 314, 322 in which the duty to arrest a drunk driver was not mandatory but discretionary.

### C. It Is Simply Not the Law in California that Employees May Not Sue their Supervisors

Reno v. Baird, (1998) 18 Cal.4th 640 only applies to ***discrimination*** claims, not to the myriad of other civil rights and constitutional claims raised by Petitioner, which Respondents would rather omit in their brief to this Court. *Cf., eg., Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 37 Cal.Rptr.2d 529, holding an individual supervisor liable for ***retaliation*** and sexual ***harassment*** under *FEHA, and Shoemaker v. Meyers II* (1992) 2 Cal.App. 4th 1407, 1423-1425, 4 Cal.Rptr. 2d 203 *and Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal. App. 4th 713, 36 Cal.Rptr. 2d 665, finding no discretionary immunity for violations of the whistleblower statutes on public policy grounds. And no case has ever held that absolute discretionary immunity under *Government Code § 820.2* can bar a cause of action under the California Constitution.

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[5] For example, the California Tort Claims Act was adopted in 1963; FEHA in 1980, the Labor Code whistleblower statute in 1984, and the Bane Act in 1987, which suggests that the Tort Claims Act could not have been not intended to bar these civil rights causes of action.

Retaliation will support punitive damages against individuals. Petitioner is not claiming and has never claimed punitive damages against the public entity; in fact her equal protection argument assumes the opposite. Accordingly, Respondent's argument at RB:15-16 is not only false and misleading, but nonsense, as well.

### D. Contrary to Respondent's False Assertion, with respect to Constitutional and Civil Rights Violations Liability, not Immunity, is the Law in California

For a seminal statement of this rule, *see Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 219, 11 Cal.Rptr. 89, 359 P.2d 457, the California Supreme Court decision that practically abolished sovereign immunity in California and triggered the California Tort Claims Act.

*And cf. Scruggs v. Haynes* (1967) 60 Cal. Rptr. 355 in which the California Court of Appeal refused to extend discretionary immunity to civil rights violations at the hands of police. Why should victims of civil rights violations at the hands of public lawyers be entitled to any less protection? If nothing else, preserving the dignity and integrity of the profession requires that, at a minimum, if be accorded the same protection, if not more.

### E. Federal law Recognizes and Respects Liability for Constitutional and Civil Rights Violations

At RB:11 Respondents refer to the similar discretionary immunity of the Federal Tort Claims Act, but omit to mention that 28 U.S.C. 2679(b)(2) thereof specifically allows suit against individual federal officials for constitutional and statutory violations, a notable difference in which California

falls short of federal law, affording the victims of civil rights violation less, not more, protection.

And why did Congress abrogate States' Eleventh Amendment immunity for violations of the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, and the provisions of any other federal statute prohibiting discrimination by recipients of federal financial assistance? See 42 U.S.C. §2000-7 and §12202. And why do federal courts recognize only qualified, not absolute, official immunity for civil rights and violations by public officials?

## CONCLUSION

Before you is not just a litigant but a lawyer who always tried to do the right thing for her public client, even at the cost of losing her job and suffering the dire financial and emotional consequences of now almost two years of cut-throat litigation, to the detriment of not just her career but, more importantly, her health and her young family.

Please do not let this happen to someone else. Grant review and also uphold the principle that public officials, particularly when they are lawyers, cannot be above the Constitution and civil rights statutes that they swore to uphold and respect.

Respectfully submitted, this 1st day of February of 1999.

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# APPENDIX

## APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| RICHARD HIGUERA, CARL McCALLA, and other former and present employees similarly situated, Plaintiffs/Appellees, | ) |
| CITY OF LOS ANGELES, and DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES Defendants/Appellants. | ) |

U.S. Court of Appeals
Docket Nos. 96-55325
96-55418
96-55419
96-55840
96-55841
96-55844
District Court Docket No. DC# CV-93-2527 JGD (Tx)
Central District of California (Los Angeles)

MOTION OF THE DEPARTMENT OF WATER AND POWER

FOR AN ORDER VACATING THE UNILATERAL EXTENSION OF THE BRIEFING SCHEDULE GRANTED BY THE CIRCUIT MEDIATOR PER ORDER FILED 10-3-96 CONTRARY TO CIRCUIT RULE 31-2.2

AND FOR AN ORDER REQUIRING APPELLEES TO FILE A TIMELY RESPONSE TO DWP'S OPENING BRIEF TIMELY FILED ON 10-1-96

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EXPEDITED DECISION BY DUTY -JUDGE REQUESTED

Appellant/Cross-Appellee **DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES** ("DWP") hereby moves this Court for an expedited order from the duty-Judge (see reason underlined below) vacating the unilateral extension of the briefing schedule granted by the Circuit Mediator per Order filed 10-3-96, contrary to Ninth Circuit Rule 31-2.2, and for an order requiring Appellees to file a timely response to DWP's opening Brief timely filed with this Court as due on October 1, 1996, pursuant to the briefing schedule last agreed to by all parties per order filed August 12, 1996. See attached Explanatory Appendix of the briefing schedule history in this case.

Said motion is made on the grounds that the Circuit Rules of this Court have been, and continue to be, violated to the irreparable and innocent detriment of Appellant/Cross-Appellee, **DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,** despite a 46-minute telephone conference held on October 23, 1996 with Circuit Mediator Dana L. Peterson at the request of Appellee's counsel that was not successful in resolving the dispute.

Because of the seriousness and-complexity of the violation, and the magnitude of the public interest at stake, it is therefore requested that this motion be referred to the duty judge and not to a clerk or other official in either the Mediator's Office or the Procedural Motions Unit, even though the motion is procedural in nature.

Decision of this motion is also requested to be Order, Appellant CITY OF LOS ANGELES ("City")'s Opening expedited because, under the Mediator's October 3, 1996 Brief is due November 1, and under the Mediator's last lawful order filed August 12, 1996, Appellees' Responsive and Opening Brief on Cross-Appeal is-due November 10, 1996, and apparently neither counsel has any intention of filing any briefs before a decision is rendered in Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), cert. granted (U.S. No. 95-897, June 24, 1996), a case currently pending before the U.S. Supreme Court.

## NATURE OF THE CASE

This is one of two cases currently pending before this Court against DWP and the City involving the regulatory and constitutional validity of Department of Labor regulations interpreting the "white-collar" exemption of the Fair Labor Standards Act ("FLSA"), specifically the disciplinary component of 29 C.F.R. 9541.118(a)(5). That regulation purports to impose liability for overtime compensation at time-and-a-half for all otherwise-exempt employees, on employers whose disciplinary policies subject employees to partial-week disciplinary suspensions for reasons other than major safety violations.

The total liability exposure is calculated at $10 million for DWP alone, due to the doubling nature of liquidated damages, substantial interest and attorneys, fees claims, and the existence of a third case against DWP still pending in the District Court, which has the lion's share on

damages.

The City additionally has two other cases pending before the Ninth Circuit, to which DWP is not a party, which it has requested to trail behind the lead case, Block vs. Dent. of Water and Power, discussed below. See attached Statement of Related Cases.

## ARGUMENT

The October 3, 1996 Order continuing the briefing schedule is contrary to Ninth Circuit Rule 31.2-2 for the following reasons:

1. Counsel for DWP was not notified of the proposed extension, and never agreed to it. The Circuit Mediator admitted in the October 23rd telephone conference that she "assumed," that counsel for the City, Assistant City Attorney Robert Cramer, would notify counsel for DWP and obtain consent, but in fact he did not. . And, in fact, at great personal sacrifice, since she was also filing an amicus brief in Auer vs. Robbins before the United States Supreme Court that was due on October 11, counsel for DWP timely filed DWP's Opening Brief on October 1, as due, believing this Court's August 12, 1996 Order to be in place, which it was, since the order granting the current extension was not filed until two days after Appellants' Opening Brief was due, on October 3, 1996.

2. Good cause is required by Circuit Rule 31-2.2(a), yet none was shown. The reason given during the telephone conference for the extension requested by Mr. Cramer was that Block v. Los Angeles Dept. of Water and Power, U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-553451 argued and submitted to this Court on March 6, 1996, had not yet been decided, and was then stayed pending Auer, per order vacating submission filed October 2, 1996. The order granting unilateral extension of the briefing schedule in a by the Circuit Mediator was filed October 3, 1996, although Mr. Cramer had apparently requested it in early September.

According to Rutter Group Practice Guide, Federal-Ninth Circuit Civil Apellate Practice, by Senior Circuit Judge Dorothy W. Nelson, page 6-19, paragraph 6:138.1, "the court seldom grants motions to stay an appeal pending disposition of another appeal unless the motion (1) is unnopposed, and (ii) states that resolution of the pending appeal will be dispositive of the appeal the moving party wants stayed."

DWP vigorously opposes any continuances of the briefing schedule because, for reasons elaborated upon below, not only is there no good cause for them, there is also tremendous prejudice to Appellants, position should they be granted, particularly DWP'S, who now has a brief on file that Appellees will have extra time tc reply to in light of numerous arguments and counterarguments briefed by the parties and multiple amici for both sides in Auer v. Robbins, previously not available, an undue advantage. And none of the proponents for continuance can unequivocally assure this Court that Aur will be dispositive, because not even the Supreme Court of the United States knows that at this time, nor for some time to come.

Additionally there are questions of liquidated damages, attorneys, fees, and extent of damages peculiar to this case because of a Mayoral Directive challenged by Appellees on cross-appeal, that will definitely not be resolved by the Supreme Court's decision in Auer because they are simply not in issue there, nor in Block, which was briefed very differently.

3. Because the extension requested by Mr. Cramer unbeknownst to counsel for DWP but with the apparent knowledge and consent of Appellees' counsel, Stuart Libicki, was for more than fourteen days, it could only be granted under Ninth Circuit Rule 31-2.2 upon written motion supported by a showing of diligence and substantial need filed at least seven days before the due date, and accompanied by a declaration stating (1) when the brief was due; (2) when the brief was first due; (3) the length of the requested extension;

(4) the reason an extension is necessary; (5) movant's representation that movant has excercised diligence and that the brief will be filed within the time requested; and
(6) whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position. No such written motion was ever filed or showing made, and counsel of record for DWP was never otherwise notified of the proposed extension except by receipt of the Circuit Mediator's order on October 10, 1996.

4. Since a previous extension of the original briefing schedule had been granted with the consent of counsel for all parties per Order of this, Court filed August 12, 1996, the October 3, 1996, verbal, unilateral extension of the briefing schedule was barred under Circuit Rule 31-2.2 in the absence of "a motion, which must be in writing, demonstrating extraordinary and compelling circumstances," which are simply not present here.

## THERE IS NO GOOD CAUSE FOR THE CONTINUANCE AND TREMENDOUS PREJUDICE TO APPELLANTS IF IT IS RANTED

Continuance of the briefing schedule is nothing more than a last-minute attempt by Appellees to cut their costs in the face of now imminent defeat- that is a risk inherent in the litigation process, particularly on appeal. But this appellant has been diligent in the prosecution of this appeal and, short of capitulation by Appellees, DWP should not be deprived of the opportunity to prevail on the arguments it has made to this Court, and possibly establish precedent helpful to itself and the public sector at large, perhaps even before Auer is decided, should this Court so choose on the basis of the briefing which so urgently needs to be completed in this case, and quite possibly used as authority by the Supreme Court in Auer.

As this Court is aware, Stanley v. City of Tracy-,

Auer and would have languished in the Ninth Circuit unnecessarily for however many months or years it takes the Supreme Court to decide Auer. This delay is particularly costly to Appellants because of post-judgment interest being sought by Appellees in this case where, for example, actual plus liquidated damages exceed half a million dollars as to DWP alone.

In any event, the import of Auer, if any, can of course be raised at oral argument of this case, or by supplemental briefs, should that even be necessary.

Continuance of the briefing schedule in Higuera is also prejudicial to the administration of justice in that DWP has a motion pending before the merits panel asking that the same panel that heard oral arguments in Block decide this case. Appellees are not opposing that motion, and every indication from the Clerk's Office is that this Court would probably grant such a motion, particularly if unopposed, because of the need to conserve scarce judicial resources and achieve consistent results in different cases pending against identical defendants. But if a stay is granted in Higuera, a decision in Block will be unnecessarily delayed for however many more months it takes the parties to complete briefing in Higuera, so that both cases can be decided together.

It would make a lot more sense for briefing in Higuera to be completed as soon as possible, particularly now that it has commenced to the innocent detriment of DWP, and if the Ninth Circuit then chooses to wait for a decision in Auer, as it has on other FLSA cases, it has two fully-briefed cases, Block which has been argued and submitted, and Higuera, which will then be ready to be argued, in light of Auer if necessary.

So while Appellees are apparently choosing, for tactical reasons, not to oppose DWP's motion to have both Higuera and Block heard by the same panel, they are, in effect, undermining the lawful purpose of that motion by their legal maneuvering for a continuance at this precise moment in the

briefing schedule.

Since the City should not suffer a dismissal of its appeal as a result of the misconduct of its own counsel, Mr. Cramer, and Appellees only get and want to write one responsive/opening brief against both Appellants, and obviously they cannot reply to a brief from the City that has not yet been filed, counsel for DWP proposed, during the October 23rd telephone conference with the Circuit Mediator, to agree to the briefing schedule set forth in the October 3, 1996 order that is being challenged here, but categorically opposes any further continuances of the briefing schedule beyond that contrary to this Court's rules. This, however, was not acceptable to other counsel, who instead requested further continuances, and have apparently no intention of filing any briefs with this Court until Auer is decided. Hence the need for the instant motion to let the Court decide.

## C0NCLUSI0N

The sad and unfortunate sequence of events giving rise to this motion is precisely the reason for rules such as Ninth Circuit Rule 31-2.2 and the ethical prohibition against ex-parte communications with the courts. As an officer of this Court and a member of the Bar, it is my sworn duty to both my client and the profession to ask this Court to uphold them.

DATED: October 24, 1996 Respectfully submitted,

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON, Chief Assistant for City Attorney for Water and Power

By /S/
OLGA H. GARAU
Deputy City Attorney

# HIGUERA V. CITY AND DWP - EXPLANATORY APPENDIX

Two groups of appeals in this case:

| Group A<br>Appeals on Liability and' Damages | | Group B<br>Appeals of Attorneys' Fees and Costs of Suit | |
|---|---|---|---|
| 96-55325 | by City | 96-55840 | by OWP |
| 96-55418 | by DWP | 96-55841 | by Plaintiffs |
| 96-55419 | by Plaintiffs | 96-55844 | by City |

History of Briefing Schedule on Cross-Appeal;

| Per Circuit Mediator Order Filed 5-29-96: | | | Per Clerk's Order Filed June 19, 1996: | | |
|---|---|---|---|---|---|
| City/DWP's | due | 10-1-96 | City/DWPIS | due | 9-23-96 |
| Appellees' | due | 11-10-96 | Appellees' | due | 10-31-96 |
| City/DWP's | due | 12-20-96 | City/DWP's | due | 12-2-96 |
| Appellees' | due | 1-3-97 | | | |

Per Circuit Mediator's Order Filed 8-12-96:
(DWP and City permitted to file separate briefs and all six appeals ordered calendared together)

| | | |
|---|---|---|
| City/DWP's | due | 10-1 -96 |
| Appellees' | due | 11-10-96 |
| City/DWP's | due | 12-20-96 |
| Appellees, | due | 1-3-97 |

Per Circuit Mediator's Order Filed 8-12-96:
(same schedule for both groups of appeals)

| | | |
|---|---|---|
| City/DWP's | due | 10-1 -96 |
| Appellees' | due | 11-10-96 |
| City/DWP's | due | 12-20-96 |
| Appellees, | due | 1-3-97 |

## STATEMENT RELATED CASES

Block v. Los Angeles Dept.of Water, U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345, argued and submitted on March 6, 1996. Per Order filed on 10-2-96, submission vacated pending disposition of Auer v.Robbins, 65 F.3d 702 (8th Cir. 1995), cert. Granted (U.S. No. 95-897, June 24, 1996). Counsel of record is identical to that in Higuera.

Harding v. City of Los Angeles, U.S.C.A. Case No. 96-55286 (Per Order filed August 2, 1996, Appellant's Opening Brief is due November 10,1996, Appellees' Responsive Brief is due November 20, 1996, and Reply Brief due January 3, 1996). Appellant CITY is represented by Robert Cramer; Appellees are represented by Stuart Libicki. DWP is not a party.

Morsch v. City of Los Angeles, U.S.C.A. Case No. 94-56701 consolidated with 94-56729. Per order filed 1-29-96, briefing schedule vacated pending conference with Circuit Mediator Dana L. Peterson; per Circuit Mediator Order filed March 20, 1996, appeal stayed pending a decision in Block. Appellant CITY is represented by Robert Cramer- Appellees are represented by Duane Reno. DWP is not a party.

McGuire v. City of Portland, Oregon, U.S.C.A. Case No. 95-35391, 91 F-3d 1293 (9th Cir. August 2, 1996). Per Order filed August 30, 1996, amicus brief received and decision on petition for reconsideration and suggestion for rehearing en banc deferred, pending Supreme Court's decision in Auer.

Stanley v. City of Tracy, U.S.C.A. Case No. 95-16242. Case argued and submitted as scheduled on October 10, 1996, and then stayed, pending decision in Auer.

# MEMORANDUM

TO: THOMAS C. HOKINSON, Senior Assistant Cl-ty Attorney Chief AssistanV City Attorney for Water and Power

FROM: OLGA H. GARAU, Deputy City Attorney

RE: Higuera v. City of Los Angeles Department of Water and Power, Ninth Circuit Case Nos. 9655325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844

DATE: November 4, 1996

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As I tried to explain to you on October 30, 1996 when you summoned me to your office that morning, and at another meeting called at 4:00 P.M. that afternoon by City Attorney James K. Hahn and attended by you, me, Civil Division Chief, Assistant City Attorney Tom Bonaventura, Employee Relations Supervising Attorney, Senior Assistant City Attorney Fred Merkin, and Assistant City Attorney Robert Cramer, and again this morning when summoned for the third time to discuss this matter with you in the presence of my Supervising Attorney, Assistant City Attorney Terso Rosales, who has just returned from protracted sick leave, several rules of ethics ethically preclude me from withdrawing the motion regarding the briefing schedule in this case for various reasons that include the fact that to do so would not be in the best interests of our client.

The motion in question speaks for itself as to why the unilateral extension sought by Cramer and opposing counsel

Stuart Libicki was totally improper and prejudicial to the client. The motion also contains legal authority refuting the incorrect legal and tactical position that all of you have taken that a stay will necessarily be granted. Moreover, withdrawal of the motion deprives the client of the possibility of having our opponent's cross-appeal subsequently stricken and of having our opponents precluded from presenting oral argument in reply to our appeal as provided by Ninth Circuit Rules for failure to file a timely brief.

The only reason that has been given to me so far for withdrawing the motion is that the City Attorney has been "embarrased" by this motion and cannot afford to have two deputies taking inconsistent positions in court, The inconsistency of course only arises because Cramer failed to file a timely brief and now wants to join, on behalf of the City, in the opposition's proposed motion to stay the appeal to cover up his mistake.

With regards to your accusation of failure to consult my supervisor in the "chain of command" before filing the motion, you admitted at the meeting with Rosales this morning that other than "common sense," there are no written or other procedures applicable to this situation and, as has always been my understanding in seven years, working in this Legal Division, that attorneys in this Office are not required to consult with their supervisors before filing pleadings, motions, and other documents in court.

I requested of you at the October 30th morning meeting in your office that the client be notified of what was happening, and I specifically requested that Department of Water and Power's Assistant General Manager and Chief Administrative Officer Faye Washington, with whom I had previously discussed this matter, be notified and attend the

meeting on October 30th in Bonaventura's office, but you flatly refused, stating that this matter was to be resolved internally within the City Attorney's Office. At the meeting this morning I again requested that the client be notified, and you again refused on the same grounds.

I expressed at the meeting on October 30th in Bonaventura's office, and again at the meeting in your office this morning with Rosales, that I have not only a legal right to complain about misconduct by another public employee, but also, in this instance,, a legal duty, because it prejudices, in my professional opinion, the interests of my public client.

The Rules of Professional Conduct applicable to all California lawyers require that the client be notified of what is happening. The conduct that you are directing me to engage in constitutes illegal deceit, collusion, and willful delay of the client's suit, punishable as a misdemeanor under the Business and Professions Code. I cannot and will not in good conscience engage in such conduct.

cc: James K. Hahn, City Attorney
Tom Bonaventura, Civil Branch Chief
Terso R. Rosales, DWP Employee Relations Supervisor
William R. McCarley, DWP General Manager
M. Faye Washington, DWP Assistant General Manager/CAO
Dennis A. Tito, President, Water and Power Commission
Jose de Jesus Legapi, Vice-President, Water and Power Comm.
Carolyn L. Green, Member, Water and Power Commission
Judy M. Miller, Member, Water and Power Commission
Marcia F. Volpert, Member, Water and Power Commission